# THE EMPLOYMENT TRIBUNALS

**Claimant:** **Mr C Swan**

**Respondent:** **Inflatanation (Newcastle) Trading Ltd**

**Heard at:** **North Shields Hearing Centre** **On:** **Monday 27 January 2020**

**Before:** **Employment Judge Shore**

***Representation:***

**Claimant:** **In Person**
**Respondent:** **Mrs S Robinson (Director)**

# REASONS

Background and Claims

1. The claimant was employed by the respondent as deputy general manager. He says that his date of commencement was 3 July 2017 with a previous employer and that there were three transfers of his employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (usually referred to as "TUPE") until he was summarily dismissed by the respondent on 4 July 2019. The respondent says that he was not employed by any of its predecessor companies before 15 December 2017 and that he therefore did not have the requisite period of service to bring an unfair dismissal claim.

2. In addition, the claimant brings claims of unauthorised deduction of pay and unpaid holiday pay which are essentially the same claim; a claim for statutory redundancy payment (if his reason for dismissal was redundancy), and; a claim for breach of contract, as he was only paid one week's notice pay, rather than the two weeks' notice, to which he says he is entitled because of his length of service.

Issues and Law

3. Neither of the parties were legally represented. Neither had complied with the directions of the Tribunal to agree a list of issues. I explained to the parties that the Tribunal operates on a set of Rules and the overriding objective (main focus)

of the Rules was to deal with cases justly and fairly. I went through the requirements to ensure that the parties are on an equal footing; deal with cases in a proportionate way; deal with cases flexibly and avoid formality and to save time and cost. The parties indicated that they understood.

4. I discussed the case with the parties and the following issues were agreed:

4.1. The respondent agreed that the claimant was an employee at the time of his dismissal, but did not agree that he had the right to claim because he did not have two years' continuous service at the date of his dismissal;

4.2. The burden was on the respondent to show the reason for dismissal (per section 98(1) of the Employment Rights Act 1996);

4.3. There are only five reasons for dismissal. Conduct is one of the five potentially fair reasons. The respondent submits that the reason for dismissal was conduct;

4.4. If I find that the reason for dismissal was not a potentially fair reason, the claimant was unfairly dismissed;

4.5. If I find that the reason was potentially fair, I have to determine whether the decision to dismiss was reasonable or unreasonable in line with the test set out at section 98(4) of the Employment Rights Act 1996, which says that:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b)shall be determined in accordance with equity and the substantial merits of the case."*

4.6 If the reason for dismissal is misconduct, then the tribunal will apply the three-stage test set out in the case of **British Home Stores Limited v Burchell** [1980] ICR 303, which requires the respondent to show that:-

4.6.1. It genuinely believed the claimant guilty of misconduct;

4.6.2. It had in mind reasonable grounds on which to sustain that belief, and;

4.6.3. At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

4.7 In assessing the reasonableness of the decision, the tribunal is guided by the case of **Iceland Frozen Foods v Jones** [1983] ICR 17, which states that the tribunal shall not substitute its decision for that of the respondent and that the decision to dismiss must be within a band of reasonable responses.

4.8 If the claimant has been unfairly dismissed, the tribunal will consider whether a reduction in any award should be made following the case of **Polkey v AE Dayton Services Limited** [1988] ICR 142.

4.9 The tribunal would also consider any deduction in the amount of a basic award or compensatory award to be made as a result of the conduct of the claimant before dismissal, pursuant to section 122 and 123 of the ERA.

4.10 The tribunal will determine which remedy to award and if the remedy is to be financial, will make an award that is just and equitable.

4.11. In respect of the claim of breach of contract, the test is not the same as that for unfair dismissal. The issue that I would have to determine is whether the claimant committed an act of gross misconduct which justified summary dismissal.

Housekeeping

5. The start of this hearing was delayed because neither party had complied with the directions given in a letter to the parties of 7 October 2019. It has to be said, however, that the claimant had made a better effort at complying than the respondent. He had produced a list of documents and sent them to the respondent, who ignored them, and he brought with him a paginated bundle of documents to the hearing. He also produced a detailed witness statement.

4. The respondent produced very little in the way of documents and no witness statements as such. However, in the limited documents it did produce on the day of the hearing, there were two documents that could be described as witness statements. These formed the basis of the evidence of the manager of the respondent's premises, Jennifer Newman.

5. I had to deal with the preliminary issue of the correct name of the respondent. I had done some research on the Companies House website before the hearing and had identified that the correct name of the respondent was probably Inflatanation (Newcastle) Trading Ltd. I discussed the issue with Mrs Robinson,

who is listed as a director of the company, and she agreed that the proper name of the respondent is the one I have set out above. I amended the respondent's name on the tribunal's record.

5. As both parties had arrived with their own set of papers, I took copies of both and created one shared bundle. I then gave a copy of that bundle to each party. I did not start the hearing proper until both parties had indicated that they had read all the papers and were ready to start.

Evidence

6. Jennifer Newman, the manager of the respondent's premises, gave evidence on behalf of the respondent and adopted the two documents that set out its case, which I will summarise, ignoring the evidence that I do not find relevant to the issues that I have to determine. The respondent has no knowledge of the claimant's contract that he says evidences his start date as 3 July 2017. The information about the contract was never disclosed. The claimant had submitted a copy contract that said his employment had started on 15 December 2017 when he had transferred to it. If the respondent has known about the claimant's alleged start of service, surely it would have dismissed him a day earlier?

7. The claimant's contract with the respondent stated that his employment had started on 25 April 2019 and that no previous service with a previous employer counted towards his continuous service. The claimant's employment had been terminated due to him being "unable to fulfil his job role."

8. The claimant had claimed he was not paid holiday pay by his former employer, but it was asserted that he had been paid all that was due to him. Everything had been discussed between the claimant and the respondent's solicitors and it had been decided that he had no claim for redundancy and unfair dismissal.

9. The second statement was said to be the detailed reasons why the respondent "had to let Christopher Swan go, due to him not passing his probationary period." It went on to explain that the respondent had failed its company audit, which had brought to its attention a number of tasks that the claimant had been in charge of, but had not been completed:

    - Staff documents that should have been kept up to date and filed away had not been completed. Some staff did not have contracts;
    - The claimant was friendly with staff who tended to spend working days chatting with him in his office, leaving the premises understaffed and colleagues who were not part of his clique feeling put upon;
    - The claimant gave his 'favourites' the best shifts and locations;
    - The claimant spent his working Sundays in his office 'chilling' with his favourite staff members;
    - The premises were left dirty at the end of his shifts in charge;
    - The claimant did not like to be contacted on his days off.

10. In answer to questions from me, Ms Newman confirmed that she had signed the claimant's contract with Xtreme Bounce (North Shields) Limited (Xtreme). She confirmed that the claimant had never been disciplined for the matters listed in paragraph 9 above.

11. The claimant gave evidence from his comprehensive statement dated 12 December 2019. He went through his various contracts of employment and referred to the various contracts and payslips he had produced in respect of each employer. His evidence is that he worked for Xtreme from 3 July 2017 to 15 December 2017. He worked under Jennifer Newman, who was general manager. On 15 December 2017, The Family Activity Centre (Newcastle) Limited took over the business from Xtreme and he continued to work under Jennifer Newman.

12. On 29 June 2018, Kidz Kingdome took over the business from The Family Activity Centre (Newcastle) Limited. He continued to work under Ms Newman. On 28 February 2019, the respondent took over the lease of the premises from Kidz Kingdom. An email was sent by Alan Boyne dated 6 March 2019 that enclosed a letter to the claimant advising him that he would be employed by the respondent from 1 March 2019 and that his terms and conditions would transfer with him. He produced the email.

13. On 2 July 2019, he received an email from Ms Newman inviting him to a meeting on 4 July 2019. He produced the email. He attended the meeting and was told by Ms Newman that his probationary period had not been confirmed and therefore, his employment would end with immediate effect. He was told he would be paid one week's notice and be given the option of working his notice, or taking pay in lieu. He chose to leave immediately, but requested written reasons for dismissal.

14. He went to collect his documents and was handed a letter dated 4 July, which was produced. The latter said:

> *"As discussed in your meeting with Jennifer today, I am writing to confirm your probationary period has not been confirmed and therefore your employment will terminate with immediate effect.*
>
> *As stated in your contract of employment, you will be paid 1 week's salary in lieu of notice.*
>
> *You have accrued 0 days holiday from 1 March to your leaving date, you have to date taken a total of 7 days holiday, leaving you with 0 days remaining.*
>
> *I confirm your final pay date will be 11 July 2019, your P45 will be issued after that date. If you have any further queries regarding your salary, please do not hesitate to contact me. I would like to take this opportunity wish (sic) you well for the future."*

15. He also received an email from Mrs Robinson dated 7 July 2019, which was produced. It said:

*"Really sorry we have had to let you go, it's nothing personal just the funding isn't there.*

*As explained by Jennifer, I will pay you your weeks' notice and please contact me if you require a reference.*

*I wish you all the luck in your future employment."*

16. He received a payslip on 24 July 2019 that included a deduction of a week's holiday pay that it had been agreed would be deducted from his entitlement in the following year. The claimant then set out a long account of his attempts to reconcile his payment position with the respondent.

17. He was not asked any questions that challenged his account or put his alleged misconduct to him.

Decision and Reasons

18. Probably the key issue in this case is identifying the date that Mr Swan started employment with the respondent. He says he started on 3 July 2017. The respondent says he started on 15 December 2017. My finding is that the claimant has shown on the balance of probabilities that his continuous employment began on 3 July 2017 with Extreme Bounce North Shields Limited. The reason that I make that finding is that he produced his contract from that organisation in his bundle and I noted that it was signed on behalf of the employer by Ms Newman, who gave evidence at this hearing and confirmed that she had signed it.

19. The claimant's employment with Extreme Bounce North Shields Limited ran from 3 July 2017 until 15 December 2017, when Mr Swan's employment transferred to the Family Activity Centre (Newcastle) Limited. He produced his contract of 15 December 2017 and payslips as evidence of that transfer.

20. There was a subsequent transfer (which was accepted by the respondent) and then a final transfer to the respondent on 1 March 2019. All the transfers were evidenced by Mr Swan's contracts, although it would appear that only the last transfer to the respondent was actually done in any semblance of a proper way under the TUPE.

21. I therefore have no hesitation in whatsoever in finding that the time of his dismissal on 4 July 2017 Mr Swan had accrued two years' continuous employment and therefore was entitled to two weeks' notice. He was paid one weeks' notice and therefore is entitled to a further week which I have calculated to be £480.69.

22. On the basis of my finding as to the claimant's dates of employment, the unfair dismissal claim has to start from the basis that he had two years' continuous employment with the respondent under TUPE. I found the claimant's evidence to be detailed, internally consistent and cogent. He was a credible witness. I found the respondent's case and evidence to be vague, inconsistent, internally inconsistent and incredible.

23. The respondent says that the claimant entered into a contract with it under which he firstly agreed that no previous periods of employment would count towards his continuous employment and, secondly, that he agreed to work a six-month probationary period. I find the concept that a probationary period should be imposed on someone who had worked for a business for eighteen months to be incongruous and unenforceable.

24. Regulation 4 of TUPE says:

> *"**Effect of relevant transfer on contracts of employment***
>
> ***4.**—(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."*

TUPE permits changes in the contract of employment to be made but only either where the contract of employment (which in Mr Swan's case would be his 3 July 2017 contract) permits it. I accept that there was a signature on the document by Mr Swan, but I cannot find that he made informed and valid consent to an implementation of the term which was entirely unreasonable. I therefore find that both legs of the respondent's defence based on its contract with the claimant do not work it its favour.

25. I find the reason for the claimant's dismissal to be conduct. The letter of dismissal refers to a failure to successfully complete a probationary period, but what the respondent meant was that it was not happy with his conduct at work.

26. The dismissal letter is somewhat contradicted, however, by the e-mail that was later sent by Mrs Robinson, in which she said that it was an economic decision that was made because "the money wasn't there to pay [him]".

27. I find that if it was conduct and he had two years' continuous employment then he was entitled to be put through a proper disciplinary procedure. No proper procedure was undertaken. There was no investigation. I find that the respondent may have genuine belief that he had committed acts of misconduct, but I find that the belief was not shown to be on reasonable grounds and I find that there was no reasonable investigation. There were no investigation notes taken, which Ms Newman was quite open about accepting.

28. I would have expected to have seen some form of investigation, even for a small company like the respondent, before dismissing somebody who had two years' service. The respondent made no check on the claimant's rights and must bear the consequences for its failure.

29. I therefore find that the dismissal was unfair.

30. In terms of the redundancy claim, it fails because there was no redundancy. The claim that Mr Swan made for his holiday pay arose out of his previous employment. That must have crystallised when he started his employment with the respondent on 1 March 2019. He didn't start ACAS proceedings until August 2019 and therefore that claim is out of time and must fail.

31. In respect of what he says was an unlawful deduction of a week's pay which was paid in holiday pay in 2019 but he had effectively agreed to bring back a week from the next holiday year, I find that the situation evens itself out. That finding deals with the issues of holiday pay and unauthorised deduction of wages: both those claims fail.

32. I have already set out the decision on the breach of contract claim and the award of £480.69 in compensation.

33. Unfair dismissal compensation is based on two calculations. Firstly, the claimant is entitled to a basic award. The basic award for Mr Swan is two weeks' pay at £480.69 a week which is **£961.38**.

34. I have decided that the just and equitable period for him to be compensated for his financial loss is a period of eighteen weeks. That is from the 18th of July 2019, which is two weeks after his dismissal. The reason I have chosen that date is that I have given him two weeks' notice, before he received one week's notice from the respondent. I have just ordered that they pay him the rest and I think that eighteen weeks from that date is just and equitable. I find that there should be no deduction for the Appellant's conduct or on the basis that a fair procedure may have produced a fair dismissal, as the respondent produced no evidence to support either possibility.

35. That takes the claimant to the date when he first found alternative employment. Those monies are paid net not gross. I worked out that Mr Swan's net weekly wage was £378.46 which times eighteen weeks is **£6,812.28**. Therefore, he is entitled to a basic award of **£961.38**, and loss of earnings of **£6,812.28**. I award **£500.00** for loss of statutory rights which, for unfair dismissal, totals **£8,273.66**. When added to the breach of contract award of **£480.69**, the total payable by the respondent to the claimant is **£8,754.35**.

**EMPLOYMENT JUDGE SHORE**

**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON**
**2 April 2020**

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